REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION 126 OF 2011

REPUBLIC .....APPLICANT

VERSUS

THE CHIEF MAGISTRATE, KIBERA.....1ST RESPONDENT

THE ATTORNEY GENERAL .....2ND RESPONDENT

THE COMMISSIONEER OF POLICE .....3RD RESPONDENT

AND

EX PARTE

JAMES KIRAGU

J U D G M E N T

The Ex-parte Applicant, **JAMES KIRAGU**, has asked this court to quash the charge sheet, proceedings, judgment or any order made or that may be made in Chief magistrate's Criminal Case No. 984/2010, at Kibera, Nairobi. That criminal case is against him.

He also seeks orders to prohibit the Attorney General and the Commissioner of Police from exercising any further investigative or prosecutorial powers with respect to Kibera Chief Magistrate's Criminal Case No. 984 of 2010.

It is his contention that the criminal case was only brought against him with the intention of settling scores against him, by MARY MUTHONI NDUNGU who had previously failed to secure orders in civil

cases which she had filed against the applicant.

By preferring the criminal charges against the applicant, the Attorney General and the Police are said to be guilty of abuse of power. In particular, they are said to have exercised their power for an improper purpose, which is to assist Mary Muthoni to frustrate the applicant from carrying out his lawful duties.

The applicant is the Managing Director of KIRAGU & MWANGI LIMITED, a company which undertakes the functions of registered valuers and property managers. One of the functions of the said company was to maintain properties on behalf of the owners thereof.

The task of maintaining properties is said to include the administration of tenancy agreements and collection of rents from tenants.

According to the applicant, his company was contracted by the KENYATTA NATIONAL HOPSITAL STAFF SUPERANUATION SCHEME to manage the property situated on LR Number 209/118/17/12, PARKLANDS, along Chemelil Road, Nairobi.

May Muthoni Ndungu was the tenant of flat Number 12, within that property in Parklands. That fact is significant because that flat is cited in the particulars of the criminal offence which the applicant is said to have committed.

According to the applicant, his company gave notice to all the tenants residing on that property that the monthly rents would increase from KShs.20,000/- to Kshs.25,000/-.

Whereas all the other tenants agreed to pay the new rents, Mary Muthoni Ndungu refused. She therefore continued to pay KShs.20,000/- monthly.

As the landlord wanted KShs.25,000/-, the applicant says that the failure to pay that sum gave rise to rental arrears, on the part of Mary Muthoni Ndungu (hereinafter cited as "the tenant").

The tenant took her fight to the Chief Magistrate's Court, at the Milimani Commercial Courts. She sought an injunction to restrain her Landlord from demanding the rent of Kshs.25,000/-.

It is the applicant's case that the Tenant's application for an injunction was dismissed by the Magistrate's Court. Thereafter, the tenant moved to the High Court, contesting the dismissal of her application.

On 21st October 2009, Okwengu J. (as she then was) held that the tenant had failed to demonstrate that she would suffer irreparable loss if the injunction orders she had sought were not granted.

The learned Judge observed as follows;

"It is true that the applicant stands to be evicted from the suit premises unless the orders sought are granted. Nonetheless this Court has to balance the interests of the applicant against that of the respondent. The applicant is not a protected tenant. Her occupation of the premises is dependent on the tenancy agreement and the goodwill of the respondents. She has a choice to leave the premises if she is not agreeable to the increase in the rent."

As the tenant was a monthly tenant, who was legally entitled to one (1) month's notice before the termination of her tenancy, the Learned Judge allowed her to remain in her flat for 30 days from 21st October 2009.

After the lapse of the 30 days grace period, Messrs KINDEST AUCTIONEERS proceeded to levy distress at the tenant's flat. Those actions were undertaken on 10th December 2009, upon the written instructions of the Law Firm of MWANIKI GACHOKA & COMPANY ADVOCATES.

The tenant responded to the auctioneer's actions by calling for help. According to the applicant, the people who responded to the tenant's calls for help, were armed. The people argued with the auctioneer's personnel, leading to a situation in which one of the said people shot and injured one of those personnel engaged by the auctioneer.

The events of that day were reported by the auctioneers, at the Parklands Police Station.

Thereafter, the applicant's company started getting calls and inquiries from the Divisional Criminal Investigation Officers (DCIO), Gigiri. The officers were carrying out investigations on the complaints lodged by the tenant, who had reported that when the auctioneers were levying distress, some of her properties were either stolen or damaged.

It is clear from these facts, as spelt out by the applicant, that both he and the tenant formed their respective opinions, that the events of 10th December 2009 gave rise to issues which required to be investigated by the police.

On the one hand, the applicant believed that the auctioneers were carrying out their lawful duties, of levying distress. Therefore, the harassment of the auctioneer's staff, including the shooting of one of them, was deemed, by the applicant, to constitute a criminal offence.

On the other hand, the tenant resisted the levying of distress, presumably because she had never agreed to pay the increased rent, as demanded by the Landlord, through the applicant.

There is no determination by any Court of Law regarding the issue as to whether or not the tenant had become liable to pay KShs.25,000/- as monthly rent. If there had been any such determination, (which was not brought to the attention of this court) then and then only could the tenant have been said to have been definitely in arrears of rent. The quantum of the arrears would have been calculable from the date when the court said that the tenant should have started to pay the increased rent.

From the Ruling of Okwengu J. dated 21st October 2009, it appears that when the negotiations between the tenant and the Landlord fell through, the Landlord gave Notice to the tenant to vacate the flat. Pursuant to that Notice, the tenant was to vacate on or before 30th June, 2009.

As the auctioneers were levying distress for rent on 10th December 2009, that implies that the tenant did not comply with the Notice to vacate the flat.

At this point in time, it has not been made clear to this court what the connection, if any, is between the applicant, his company and Kindest Auctioneers.

The Landlord's advocates, M/s Mwaniki Gachoka & Company Advocates, wrote directly to Kindest Auctioneers on 23rd November 2009, instructing them to levy distress after giving the requisite Notice to the tenant.

The auctioneers were told that the arrears of rent had accumulated to KShs.114,000/- as at 23rd November 2009. The arrears are said to have accumulated because the tenant

"has been failing to pay the required rent of KShs.25,000.00 per month."

By that letter, the advocates for the Landlord were giving their own interpretation of the legal position. As the said interpretation was not founded upon the decision of any court, I am unable, at this moment, to state whether or not it was sound.

Suffice it to say that whether or not the auctioneers were entitled to levy distress, that would not have

entitled them to either steal from the tenant or to destroy any of her property.

In the same vein, if the auctioneers were not entitled to levy distress, that could not have authorized the tenant or anybody else to take the law into their own hands, and to attack the auctioneers.

If criminal offences were committed when the auctioneers were levying distress, the police were entitled; indeed they were obliged, to carry out appropriate investigations. Those investigations have to be carried out objectively, with a view to prosecuting any person who is found (by the police) to have committed a criminal offence.

Two wrongs do not make a right. Therefore, even if the auctioneers are found to have acted without lawful authority; or if they had lawful authority to levy distress but then committed criminal offences when levying distress, that would not have entitled the tenant to break the law.

The applicant says that the levying of distress for rent was carried out in his absence. But he also says that the said exercise was proper and in accordance with the law.

If he was not present when the exercise was being conducted, I fail to appreciate how he could conclude that the exercise was carried out in a proper manner.

He may believe that because the auctioneers were instructed by a law firm, to levy distress, that made the exercise lawful. However, that may not necessarily be the position. It must be acknowledged that an advocate may make an honest mistake.

Of course, I have not been called upon to determine whether or not the instructions herein were properly anchored on the correct interpretation of the law.

But even assuming that the legal interpretation was sound, that could not excuse criminal acts, if any, that were committed during the exercise of levying distress.

I am fully aware that this court has a legal duty to prevent the abuse of the process of the court.

Therefore, if it were shown that the Attorney General or the Commissioner of Police had preferred criminal charges against the applicant simply for the purpose of causing him embarrassment or to put him to unnecessary expenses and agony, I would not hesitate to put a stop to the proceedings in the criminal case.

Is the material before the court so frivolous that the Attorney General or the Commissioner of Police would not, if they were acting fairly, have used it as the foundation for a prosecution? If the answer is in the affirmative, then the High Court should put a stop to the proceedings.

However, in determining whether or not to put a stop to criminal proceedings, the court is obliged to balance the right of the applicant against other fundamental rights, freedoms and the general welfare of individuals and of the society.

In the event, there is no doubt that a criminal case ought never to be used to either advance or to frustrate any party from pursuing their legitimate rights in other civil cases.

Can the tenant be said to be using the criminal case against the applicant, with a view to either advance her civil case or to frustrate the applicant's right to levy distress for rent?

In the letter dated 10th February 2010, the applicant's company, M/s Kiragu & Mwangi Limited, told the Commissioner of Police that;

"13) We understand that the auctioneer and one of his staff were arrested, charged and released on bail on these purported claims by the *previous tenant* ***that her household goods were damaged or***

missing from the events of 10th December." – *Emphasis mine.*

In effect, the tenant, MARY MUTHONI NDUNGU, was no longer a tenant as at 10th February 2010. The applicant was arrested on 11th February 2010, after he recorded his statement at Gigiri Police Station.

As the arrest was effected after the tenant had moved from the flat at which the auctioneers had levied distress for rent, and because it was only thereafter that the criminal proceedings against him were commenced, it cannot be said that the said criminal proceedings were calculated to frustrate the applicant's efforts to levy distress. Once the relationship of Landlord and Tenant came to an end, the Landlord cannot levy distress for rent.

The settlement of the issue as to whether or not there had been arrears of rent as at the date when the auctioneer levied distress cannot settle the question of the alleged theft of property worth Kshs.605,260/- from the tenant. The rent arrears, if any, were owed to the Landlord. And even though the applicant had acted as the Landlord's agent at some point in time, his being cleared of the charges of theft, could not, of itself make good the Landlord's claim for rent.

There is not even a suggestion that if the criminal charges are dropped against the applicant, the Landlord would abandon the claim for arrears of rent against the tenant.

The converse is also true: that the Landlord has not promised to abandon its claim for rent arrears if the tenant withdraws her claim against the applicant.

In the circumstances, I find myself unable to accept the applicant's contention that the predominant purpose of instituting he criminal charges against him was to pressurise him or the company to settle or forestall distress for rent arrears or to yield to the tenant's appeal against the intended increment in rent.

In the event, the application is without merit. It is therefore dismissed.

Dated, Signed and Delivered at Nairobi, this 17th day of May, 2012.

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FRED A. OCHIENG